Editor's note: 80 I.D. 261; Appealed – aff'd, Civ. No. 73-1288 (C.D. Calif.), aff'd, No. 73-2974 (9th Cir. June 27, 1974) 500 F.2d 200

UNITED STATES

v.

R. W. BRUBAKER, ET AL.

IBLA 70-116 Decided February 6, 1973

Appeal from decision by the Office of Appeals and Hearings, Bureau of Land Management, affirming an Administrative Law Judge's 1/ decision declaring placer mining claims null and void in Riverside Contests Nos. 02776, 02777 and 02778.

Affirmed.

Mining Claims: Common Varieties of Minerals: Generally--Mining Claims: Common Varieties of Minerals: Special Value--Mining Claims: Determination of Validity

Where mining claims are located after enactment of the Act of July 23, 1955 for deposits of naturally colored volcanic stone having various colors, the stone being mined, crushed, sold, and used for roofing rock, the

1/ The title of "Hearing Examiner" was changed to "Administrative Law Judge" pursuant to Order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).

deposits are common varieties of stone and are not subject to location under the mining laws after July 23, 1955, where it is shown that similar volcanic stone is of widespread occurrence and that the claimants obtain the same price in the market for the stone as their competitors who produce and sell similar naturally colored volcanic stone. It is not enough to remove the stone in issue from the common varieties category merely to show that it sells for a somewhat higher price than other commonly occurring rocks used for the same purpose that are less attractively colored, such as crushed granite, limestone and pea gravel.

APPEARANCES: John B. Lonergan, Esq., of Lonergan, Jordan & Gresham, San Bernardino, California, for appellants; George H. Wheatley, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Los Angeles, California, for the appellee.

OPINION BY MRS LEWIS

R. W. Brubaker, and others 2/ have appealed to the Secretary of the Interior from a decision by the Office of Appeals and Hearings, Bureau of Land Management, dated December 9, 1969, which

2/ Appellants are R. W. Brubaker a/k/a Ronald W. Brubaker; B. A. Brubaker a/k/a Barbara A. Brubaker; and William J. Mann a/k/a W. J. Mann.

affirmed an Administrative Law Judge's decision of September 11, 1969, declaring the Nebocher, Near Pink, Orchid Slope No. 1, and Calico Shores placer mining claims null and void. The decision held that the deposits on the claims are common varieties of stone no longer subject to location under the mining laws.

In their appeal, appellants contend that the naturally colored volcanic stone here involved is not a common variety and is therefore subject to location under the mining laws.

The four claims were located after the enactment of the Act of July 23, 1955, 30 U.S.C. §§ 601-615 (1970), section 3 of which, id. § 611, removed common varieties of stone, inter alia, from the operation of the mining laws. Thus, if the deposits are held to be common varieties, the claims are void ab initio.

We have carefully reviewed and considered the entire case record, including the testimony and documentary evidence presented at both hearings. 3/ As a result, we concur in the decisions below. Accordingly, we adopt the Bureau's decision of December 9, 1969, a copy of which is attached.

3/ The second hearing was held as a result of a remand by the Department for the presentation of evidence as to a comparison of the deposits in question, with other deposits of similar type minerals and whether the market price is significantly greater than that for the common varieties of minerals used for the same purposes, i.e., roofing rock.

Appellants raised essentially the same arguments as they did in their appeal to the Bureau from the Judge's decision, which contentions were properly disposed of in the Bureau's decision. However, we feel compelled to discuss in more detail the main thrust of their appeal, which is that the Judge and the Bureau erred in comparing stone having certain properties with other stone possessing the same properties, although the evidence shows that the subject stone brings a somewhat higher price as compared with the prices brought by other stone not possessing such properties in acceptable or desired degrees.

We find that each of the four claims involved contains volcanic stone of a different color -- pink, gold, lilac and beige. Deposits of similar volcanic stone of varying colors are of widespread occurrence in the desert in the general area of Barstow, California, where the appellants' mill is located. The varied colors in the rock are imparted by minerals such as iron oxides and hydroxides, iron hydroxide limonite, manganese oxides, and hematite. Appellants quarry the rock by drill blasting, and load it in trucks with skip loaders and haul it to their mill in Barstow where it is crushed, bagged, and sold for $12 per ton f.o.b. the mill in 80-pound bags. The total production costs are approximately $10 per ton.

The principle use of the material is for roofing rock, although a small amount is sold for other construction and landscaping

purposes. The primary market is Southern California, including Los Angeles. The total market demand for the naturally colored volcanic stone is approximately 3,000 to 4,000 tons per month, of which appellants supply approximately 50%, while their two main competitors supply about 40% and 10% of the market. The competitors also obtain $12 per ton. Appellants have ten different colors of rock in their line obtained from these and various other mining claims and private lands.

The deposits on the four claims in issue possess properties desirable for a good roofing rock, such as color, hardness, opaqueness, retention of color, desirable crushing characteristics, and chemical resistance to weathering and to the other roofing materials which it is used to protect. However, there are other kinds of commonly occurring rock which are used for roofing rock, such as crushed granite, limestone and pea gravel, as well as slag -- a waste or by-product of a nearby steel mill -- although they sell at somewhat lower prices than the naturally colored volcanic stone. Some of these rocks are artificially colored and are sold for roofing rock. The quantity of slag used in the market is approximately 2,500 tons per month, of which about 25% is artificially colored, although the record is totally devoid of any evidence as to the total market demand for crushed granite, limestone and pea gravel. 4/

4/ It is reasonable to assume that the total monthly demand for crushed granite, limestone and pea gravel, when added to

Limestone and crushed granite in 80-pound sacks sell for $10.50 and $8 per ton, respectively, while pea gravel (sold only in bulk) sells for $1.60 per ton. Slag sells for $9.45 and artificially colored slag for $14.85 a ton, the colored slag being priced higher than the rock here in issue.

Witnesses for appellants testified that the colors of the rock in issue made it unique, otherwise it would be a common rock, and that the colors alone bring the higher price. Most buyers are concerned with the color and not with the other properties of the rock. The subject materials are used only on roofs that are visible or where an attractive color is important. Otherwise, common color rocks are used, such as granite, limestone, etc. It is apparent that much of these latter kinds of rocks are used in the market area, the different colored stones in issue being used to satisfy the aesthetic tastes of individual consumers, architects or stone dealers.

The Judge noted that the contestees and their competitors quarry, process, and sack their material at a cost of $10 a ton and sell it for $12 a ton. He stated that the occurrence of such materials are so common that there is little possibility of one

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fn. 4 (Cont.)
the 2,500 tons of slag used in the market, will at least equal or exceed the 3,000 to 4,000 tons of naturally colored volcanic stone used.

deposit having a significantly higher value than another deposit containing stone with similar characteristics, and concluded:

> The contestees established that they have deposits of volcanic material which they can process and market at a profit. They did not establish that their deposits have a distinct and special value over and above many other deposits having the same characteristics and useable for the same purposes. Thus the deposits on the four claims must be considered common varieties of stone no longer subject to location under the mining laws. (Emphasis supplied).

With reference to the underlined portion of the above quotation, the Bureau in affirming the Judge stated:

> * * * From a reading of the Hearing Examiner's [Administrative Law Judge's] entire decision, it is clear that he meant that the mining claimants did not establish that their deposits have a distinct and special value over other deposits in common supply in the same market area having the same characteristics and useable for the same purposes. * * * (Emphasis supplied by the Bureau).

United States v. Alfred Coleman, A-28557 (March 27, 1962), involved mining claims comprising 720 acres located on quartzite deposits of varying colors for building stone. The claimant said he needed all of the claims to be able to provide a complete range of colors of ornamental rock for construction use. This department held that "In view of the immense quantities of identical stone found in the area outside the claims, the stone must be considered

a 'common variety' within the meaning of the Act." This finding was upheld by the Supreme Court in affirming the Department's decision. See United States v. Coleman, 390 U.S. 599, 603-605 (1968).

Accordingly, we find the subject mining claims to be null and void.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

_____
Anne Poindexter Lewis, Member

We concur:

_____
Edward W. Stuebing, Member

_____
Martin Ritvo, Member

December 9, 1969

DECISION

United States of America Contestant	: Nebocher placer mining claim : located in sec. 12, T. 9 N., : R. 1 W.; Near Pink placer claim
v.	: located in sec. 28, T. 10 N., : R. 1 W.; Orchid Slope No. 1
R. W. Brubaker a/k/a Ronald W. Brubaker, B. A. Brubaker a/k/a Barbara A. Brubaker, and William J. Mann a/k/a W. J. Mann, Contestees-Appellants	: placer claim located in sec. 8, : T. 9 N., R. 1 E.; and Calico Shores : placer claim located in sec. 30, : T. 10 N., R. 1 E., S.B.M., : California.

Decision Affirmed

The above-named appellants have appealed from the hearing Examiner's decision dated September 11, 1969, which determined that the above-identified mining claims are null and void for lack of a discovery of a locatable mineral pursuant to the provisions of section 3 of the act of July 23, 1955, 30 U.S.C. § 611 (1964), within the boundaries of any of the claims.

The mining claims in issue were located for a colored volcanic rock after the enactment of section 3 of the act of July 23, 1955, supra, which provides, in pertinent part:

> No deposit of common varieties of sand, stone, gravel * * * shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws * * *. "Common varieties" as used in this act does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value * * *.

A hearing was held before a Hearing Examiner on November 21, 1963. By a decision, A-30636 (July 24, 1968), in these proceedings, the Department set aside the Bureau's decisions then under consideration. The departmental decision noted that the crucial issue is whether or not the evidence preponderates that the stone does have physical and chemical properties giving it a distinct economic value

within the meaning of the quoted act. The Department pointed out that in determining whether a deposit has a distinct and special value there must necessarily be a comparison of the deposit with other deposits of similar type minerals. The decision noted that there was no evidence that the material within the claims has some property making it useful for some purpose for which other commonly available materials cannot be used. The decision then defined the criteria for determining whether such a deposit of stone is a common or uncommon variety by stating that if the deposit is to be used for the same purposes as minerals of common occurrence, then there must be a showing not merely that the material is marketable, but that some property of the deposit gives it a special value for such use and that this value is reflected by the fact that the material commands a significantly higher price in the market place. Then the departmental decision remanded the contest proceedings, holding:

> The present record does not contain sufficiently detailed information upon which a comparison may be made of the economic value of the rocks within these claims with other stone used for the same purposes. The general statements of the witnesses at the hearing as to the economic value of the rocks were not supported by evidence showing differences in market prices between these rocks and other materials being used for the same purposes. Therefore, a further hearing in this case is needed to receive evidence on this issue of the comparative market place value of this stone with other materials used for the same purposes before a final decision can be made as to whether the deposits of stone within these claims are of an uncommon variety as defined under the act and the standard discussed above.

Consequently, a further hearing was held before a Hearing Examiner on December 5, 1968.

The appellants object in their present appeal to the Hearing Examiner's finding at page 7 of the decision appealed from that they "did not establish that their deposits have a distinct and special value over and above many other deposits having the same characteristics and useable for the same purposes." (Emphasis supplied by the appellants.) From a reading of the Hearing Examiner's entire decision it is clear that he meant that the mining claimants did not establish that their deposits have a distinct and special value over other deposits in common supply in the same market area having the same characteristics and useable for the same purposes. The appellants assert that the Hearing Examiner failed to apply the facts adduced at both hearings to the criteria defined in the Brubaker departmental decision, supra, for determining whether such deposits of stone come within the category of common varieties of stone pursuant to the quoted act.

The evidence adduced at both hearings shows that:

Witnesses for both parties at the earlier hearing stated that the material in issue was used for "roofing granules" (1963 Hr. Tr. 11-12, 39, 73, 117). At the subsequent hearing Mr. Brubaker and one of the contestees' witnesses explained that in their opinion "roofing granules" were used in the manufacture of asphalt shingles and rolled goods, and the material on the mining claims in issue was too large to be suitable for such use (1968 Hr. Tr. 52-53, 79-80, 96). This question of semantics is not significant in these proceedings since the

witnesses at both hearings agreed that the crucial use of the colored volcanic rocks on the mining claims is in the build-up roofing industry--two layers of saturated felt are generally laid down and covered with hot asphalt, then colored roofing rock is thrown on top to give the roof color and protect the underlayers from the rays of the sun (1963 Hr. Tr. 13; 1968 Hr. Tr. 79, 123). We shall follow the practice of the Hearing Examiner at the later hearing and refer to the material in issue as being used primarily for "roofing rock," since that appears to be the term used in the build-up roofing industry.

From the evidence, it is clear that although most rock is not suitable for roofing rock purposes (1963 Hr. Tr. 92), there are widespread deposits of different rocks that are practical for such purposes (1963 Hr. Tr. 43; 1968 Hr. Tr. 83, 118). Mr. Brubaker testified that he has had to do considerable exploring to find sources of such rock that is attractive, but he did testify concerning eighteen quarries in the Barstow area in which suitable colored roofing rock is produced (1963 Hr. Tr. 64; Exh. B). The mining claimants' consulting geologist testified that, in his opinion, the colors of the rock in issue made it unique, otherwise he agreed it would be a common rock (1963 Hr. Tr. 132, 135). A wholesale building material dealer also agreed that colors alone bring the higher price (1968 Hr. Tr. 120).

The mining claimants have several sources from which to supply the roofing rock they sell. The company quarries some of the rock on a royalty basis, they have acquired some lands as a source of supply, and they have located placer claims in the area for such rock (1963 Hr. Tr. 58). The company sells ten colors of roofing rock (1963 Hr. Tr. 60, 90). The rock on the claims in issue is colored gold, pink, lilac and beige, each claim having a different colored rock (1963 Hr. Tr. 60). To avoid possible trespass charges, the company is not quarrying rock from the Nebocher, Orchid Slope No. 1 and Near Pink claims; they are able to supply most of the colors found on these claims from lands they have purchased (1968 Hr. Tr. 71).

During the hearing held in 1968, Mr. Brubaker showed that there is a market of from 3,000 to 4,000 tons of colored roofing rock a month in the area (Tr. 107-108), that his company sells approximately 1,500 tons of the material a month (Tr. 53, 70), and that his two major competitors produce most of the rest of the rock for the local market (Tr. 62, 116, 119). Brubaker-Mann's two major competitors produce roofing rock from similar materials to that sold by the contestees, and they all sell it for approximately the same price (Tr. 22, 28, 63-64, 102, 119-120). In other words, stone of the same general characteristics is sold for approximately the same price by those in the industry (Tr. 108, 119-120). Red and green colored roofing rock sells for $13 a ton, but there is no such rock on any of the claims in issue (Tr. 55). The pink colored stone on one of the claims in issue has at present a low market demand (Tr. 72). The evidence shows that the mining claimants, and their competitors, sell the type of stones on the claims in issue at the mill at a price of approximately $12 a ton (Tr. 28, 54-55, 87, 109). There was no explicit testimony concerning the expenses of the mining claimants' competitors,

except that one active producer has an appreciable freight advantage over Brubaker-Mann quarries (Tr. 62). Mr. Brubaker showed that he produces the rock at a cost of approximately $10 a ton (Tr. 54-55). There are several other materials used for the same purposes as natural colored roofing rock, and the testimony of the mining claimants' witnesses was not in accord as to the comparative advantages of one matrial over another. Mr. Brubaker was of the opinion that colors must not fade (1963 Hr. Tr. 62), while one of his witnesses stated that it was not important if some fading occurred. A stone dealer testifying for the mining claimants stated that he only used colored stone if the roof could be seen, otherwise local gravel or other less expensive rocks were used (Tr. 124-125). The market for natural colored roofing rock goes up and down, but has been good for the last 20 years (Tr. 114); however, the industry is able to supply the market demand.

A summary of the evidence shows: (1) There are many rocks and other materials used for the same purpose as the rock in issue; (2) the rock in issue sells for no higher price than other attractive stones offered in the market for the same purpose by the contestees and their competitors; (3) there is a sufficient supply of attractive rock of suitable quality from many different deposits in the area so that those in the industry have been able to adequately supply the market demands; 1/ and (4) no economic advantage in producing the stone has been asserted over that of similar competing stones in the area. In response to the decision of the United States Court of Appeals for the Ninth Circuit, McClarty v. Secretary of Interior, 408 F. 2d 907 (1969), the Department in United States v. Kenneth McClarty, 76 I.D. 193 (1969), explained that stone used for the same purposes as more common stone must show a significant economic advantage because of a unique property to come within the category of an uncommon variety of stone. Thus, the Department in its latest McClarty decision, supra, somewhat developed its explanation, set forth in the departmental Brubaker decision, supra, and stressed in the appellants' statement in support of their appeal, of the criteria for determining whether deposits of rock are an uncommon variety. The appellants have not shown that the Hearing Examiner was in error in finding that the stone in issue is a common variety of stone under the quoted act and the standards discussed heretofore. Taking the criteria into consideration mentioned in the latest McClarty decision, supra, it is not enough that the rock in issue sells for a higher price than rock used for the same purpose that is less attractively colored, where there is no showing that the deposits in issue have any economic advantage over other suitable, attractive rock in the area which is commonly available in sufficient

1/ In this connection we note the readiness with which the mining claimants obtained suitable rock of most of the colors found on the claims in issue from other sources when these adverse proceedings were initiated.

quantities to adequately supply the market demands. The contestees were required to offer a preponderance of the evidence to overcome the Government's prima facie showing that the material in issue is a common variety of rock, and the contestees have failed to make the necessary showing. The stone in issue is a common variety of stone, and common varieties of stone were not locatable under the mining laws at the times the mining claims in issue were located, nor are such materials now locatable.

Accordingly, the Hearing Examiner's decision determining that the Nebocher, Near Pink, Orchid Slope No. 1, and Calico Shores mining claims are null and void is affirmed.

The above-named appellants have the right of appeal herefrom to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D.C. 20240. The filing fee will be computed on the basis of $5 for each mining claim included in the appeal. If the appeal covers all mining claims adversely affected by this decision, the total filing fee will be $20. In taking an appeal there must be strict compliance with the regulations. The appellants must show wherein the decision appealed from is in error.

If an appeal is taken by the appellants, the attorney for the adverse party who must be served is:

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Enclosures 2

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